**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(Coram: Kneller, Nyarangi & Platt JJA)**

**CIVIL APEEAL NO. 31 OF 1985**

**BETWEEN**

**RUSSEL CO. LTD.....APPELLANT**

**AND**

**1. COMMERCIAL BANK OF AFRICA**

**2. LAND DEVELOPMENT LIMITED.....RESPONDENT**

***(Appeal from the High Court at Nairobi. Todd J)***

## JUDGMENT

The Plaintiff in Suit No 2179 of 1984, Russell Company Limited brought an action against the Commercial Bank Limited (the First Defendant) and the Land Development Limited (the Second Defendant) seeking redress because the First Defendant had sold a residential parcel of land under a Mortgagee's statutory powers of sale to the Second Defendant. The general trend of the plaint filed on August 10, 1985 is that the First Defendant knew that the mortgage over the property had been obtained by fraud, and consequently that the First Defendant ought not to have exercised its statutory powers of sale, and further that the SecondDefendant was also at fault in completing the transfer of this land to it. In a word, all these transactions were a fraud upon the Plaintiff Company.

On the same day, August 10, 1984 that the plaint was filed, a chamber summons was filed seeking a vacation hearing for an interlocutory injunction to restrain the First Defendant from parting with the proceeds of the sale until the suit is determined, and the Second Defendant be restrained from transferring the parcel of land in question, and further, from interfering with the Plaintiff Company's use of the land. Trainor, J granted the application and imposed interim injunctions on the Defendants as from August 10, 1984 pending the *inter partes* hearing of the summons.

Todd, J heard the matter on August 23, 1984 and on August 27, 1984 he came to the conclusion that in the circumstances for the case as put before him, the Plaintiff would be adequately compensated by an award of damages, and therefore that the Plaintiff Company had not made out a case whereby he could exercise his discretion to order any of the injunctions applied for. He further declined to follow the well-known decision in *Erinford Properties Ltd v Cheshire County Council*, [1974] 2 All ER 448 whereby he might have considered extending interim injunctions granted by Trainor, J pending the appeal against his refusal. Accordingly the injunctions granted by Trainor, J were discharged. Fortunately, this Court was

able to preserve the *status quo* because the Second Defendant agreed not to sell the property until the disposal of the appeal.

The Plaintiff Company has now brought the appeal against the substantive refusal to grant the injunctions applied for. We shall have something to say at the end of this judgment about the refusal to grant an injunction pending the appeal.

The appeal brought by the Plaintiff Company against the two Defendants, (and to whom it will be convenient to refer in their capacities in the suit,) might be described in short as challenging the High Court's preference for an award of damages in lieu of an injunction as well as the ruling on the question of notice of intention to exercise the mortgagee's right of sale. But, as background to those matters, the submission seems to be that the learned Judge did not really appreciate the facts of the case before him. Indeed he did not consider the Plaintiff Company's case against the Second Respondent at all. In those circumstances, it will be necessary to attempt to set out a narrative of what occurred between the parties as they see it.

There is no doubt that the Plaintiff Company was formed as a private limited company for the purpose of operating a business which would provide a livelihood for Nicholas James Russell and his wife, Audrey Elsie Russell. The Company purchased the suit premises LR No 7336/54 in Miotoni Lane, Karen for the purposes of the two directors, Mr and Mrs Russell, making their matrimonial home there. Mr Russell apparently continued as a director until January 1977, in which year the marriage broke down, Mr Russell deserting the matrimonial home and leaving Mrs Russell in occupation of it. It seems that Mrs Russell did not continue in occupation for long but negotiated a lease of the premises on behalf of the Plaintiff Company as from January, 1978. Mr Kamau Kuria tells us from the bar that Mrs Russell felt unsafe living in the house alone but it also seems from a statement of Mr Russell in earlier proceedings that the lease of the premises was to provide Mrs Russell with maintenance after the marriage had broken down. At any rate that was the view of Masime, J in his ruling in Misc Civil Suit 169 of 1980. The agreement for the lease was for two years to one Edward Boyden Rice, but no f ormal lease was ever drawn up, although Mr Rice occupied the premises from 1st February 1978. It seems that Mr Rice was not content with this position, and he asked for a formal lease, causing his advocate to search for the title. It then transpired towards the end of 1978 that Mr Russell had registered the property in his name. Mr Rice then brought interpleader proceedings (Misc Civil Case No 169 of 1980) in order to ascertain to whom he should pay rent. Masime, J decided that Mrs Russell spoke the truth that the Plaintiff Company had purchased the property and had paid the deposit of Kshs 29,000 which was 10% of the purchase price of Kshs 290,000. Before Masime, J it was not disputed that the Company paid a total of Kshs 150,000, leaving a balance of Kshs 140,000 which the Company raised as a mortgage loan from the Housing Finance Company of Kenya Ltd. Thereafter the Company made payments of the mortgage loan for as many as 69 instalments at Kshs 1,974.25 per month until April 5, 1977. These instalments were paid by banker's order which was then apparently cancelled. Masime, J rejected Mr Russell's contentions that he had obtained an interest-free loan from the Plaintiff Company of Kshs 150,000 and that he had mortgaged the property with the Housing Finance Company of Kenya Ltd for Kshs 140,000. Although the Company had made the mortgage repayments, these were debited to him personally. He claimed to have permitted the Company to collect rents in order that the Company could recover its loan to him and also to provide Mrs Russell with maintenance. He had then borrowed Kshs 200,000 on the security of the suit premises and had applied Kshs 58,000 towards the redemption of the outstanding the HFCK Mortgage and the balance on his own affairs. As noted above, Masime, J did not believe this story, and came to the conclusion that Mr Russell having been the managing director of the Plaintiff Company, had contrived a fraud upon the Plaintiff Company and Mrs Russell, his co-director, by having the suit premises registered in his name. This fraud was not discovered by Mrs Russell until the end of 1978. Having discovered it, she entered the caveat. In the result, Masime, J declared a resulting trust in favour of the Plaintiff Company as the real purchaser of the suit premises and he directed the Registrar of Titles to cancel the registration of Mr Russell.

The Plaintiff Company's success was short-lived. After the judgment of Masime, J delivered on July 21, 1981 Mr Russell successfully applied for a stay of execution pending appeal which was granted on January 14, 1982, after which the present Defendants appear on the scene. As far as this motion is

concerned, the appeal against Masime, J's orders has not been heard.

It is instructive now to turn to the Memoranda on the title of the parcel known as LR No 7336/54. At Memorandum 4 the transfer to Mr Nicholas James Russell is noted on May 12, 1971, and at Memorandum 5 there is the charge to the HFCK Ltd also dated May 12, 1971. At Memorandum 6 there is a caveat by the Russell Company Limited dated November 13, 1978. But this caveat was removed on August 3, 1979; at memorandum 8, which then permitted the charge to the Commercial bank of Africa on September 12, 1979 and the discharge of the charge to the HFCK Ltd. That will be seen in Memoranda 8,9 and 10. The lease to Mr Edward Boyden Rice appears. There is the transfer to the Second Defendant freed and discharged, from memorandum 10, namely the charge to the Commercial Bank of Africa Ltd. The transfer to the Second Defendant was registered on July 25, 1984. The picture that develops therefore, seems to be that Mrs Russell on behalf of the Plaintiff Company leased the premises to Mr Rice from 1978 to 1980. During the course of this lease Mr Russell's position was discovered. The Plaintiff Company tried to secure its position by caveat but that lasted from November 13, 1978 until August 3, 1979. By September 12, 1979 Mr Russell raised the contentious mortgage loan from the First Defendant Commercial Bank of Africa Ltd. He seems to have entered into a formal lease with Mr Rice for two years from February 1, 1980 until January 1982. In the meantime, the interpleader action had been commenced in 1980 and had been decided in July 1981, although execution was stayed on January 14, 1982, so therefore Mr Russell was able to continue to appear as a registered owner from January 1982 onwards. However, if Masime, J were to be upheld, then it would mean that Mr Russell would have had no title to pass to the Commercial Bank of Africa Ltd as mortgagee since he was not really the registered owner, having kept the Plaintiff Company out of its rights of registration. On the other hand, pending the stay of execution, the Plaintiff Company may have been in a vulnerable position because it seems that the Registrar of Titles did not accept the order of the Court served upon him. What exactly happened next is not easy to ascertain and of course from the final and vital stage of the story which led to the First Defendant selling the property.

The Plaintiff Company did not feel the need to examine with any critical appraisal the decision of Masime, J on the question whether he could order the Registrar to alter the registration of Mr Russell as owner of the premises. It is usual and in accordance with Order XX Rule 5A for the abstract title to be called for and inspected before a change is made to it, and that would have led to the discovery of the charge taken out in 1979 before the interpleader summons was taken out. What the Plaintiff did was apparently to acquaint the First Defendant of Masime, J's judgment and orders, and to hope that the charge would not be acted on pending the appeal. The first Defendant had sent a final notice dated October 30, 1981 to Mr Russell claiming Kshs 213,638 as being outstanding on September 1981. The First Defendant did not take action until 1984, during which time the First Defendant must have become alarmed that the appeal had been delayed for two years, and Mr Russell had not paid off the loan. The First Defendant then sent the notice to the Plaintiff Company dated January 30, 1984, to the effect that the mortgage money had been called in and the property would be advertised for sale. It is not know at first hand, what took place between the Plaintiff Company and the First Defendant Bank. According to the letter of the Auctioneer Court Brokers CB Mistri, dated June 1984, the First Defendant had put the property on the market by its letter of May 25, 1984. The Auctioneers informed the First Defendant's advocates, with a copy to Mr Russell (but not to the Plaintiff because presumably CB Mistri did not know of the Plaintiff Company's interest in the property), that the sale would take place on July 5, 1984. Later on July 10, CB Mistri informed the First Defendant's advocates that the property was sold on July 5, 1984 for Kshs 1,100,000.

In the meantime, the Plaintiff Company had acted as owner of the property and after Mr Rice had left, Mrs Russell says she let the premises to a Mr Young in January, 1984.It is not yet clear but perhaps in answer to the notice of January 30, 1984, Mrs Russell states (para 16 of her affidavit of August 17, 1984 ) that the Plaintiff's Advocate, Mr NP Vohra informed the First Defendant's Advocates of the ruling of the High Court given by Masime, J. But in any case, the Plaintiff's former advocates had always copied to the First Defendant's Advocates, correspondence touching the interpleader summons. Mr NP Vohra has not explained his actions in an affidavit. But it is Mr Kamau's contention that he must have so acted, because otherwise the First Defendant would not have been able to send the Plaintiff Company the notice of January 30, 1984. That seems to be an indication that the First Defendant knew, before the property was

put up for sale, of the Plaintiff Company's interest in the property. For good measure Mr Philip Mutuku Mutungi, the Assistant Manager, Loan Recoveries, of the First Defendant Bank, reveals that he knew all about the interpleader summons dealt with by Masime, J pointing out the lack of production of the title, and absence of the First Defendant. Mr Mutungi's affidavit dated August 22, 1984 does not say when the Bank came to know of the orders of Masime, J. But equally, and just as important, there is no denial of lack of knowledge before the sale. Mrs Russell just went on with the lease to Mr Young, until the latter did not pay his rent at the beginning of July 1984. On July 13, Mrs Russell telephoned to inquire about the rent, and Mr Young told her the unpalatable truth, that the house had bee sold, so he would not pay. Mrs Russell found that to be the position from the property columns in the Standard Newspaper, and from telephoning CB Mistri. Mr Young vacated the house on July 14, 1984 and Mrs Russell went into occupation on July 15, 1984. That same evening the Managing Director of the Second Defendant, Mr Wangunya found her in occupation. Mr Wangunyu told Mrs Russell that he had purchased the property, and Mrs Russell told him that after the Court's order ( of Masime, J) he could not buy it, and that there would be an injunction to stop the sale.

At last the Plaintiff Company began to move. As everyone knows, the sale would not be complete until registration (see Section 32 of the Registration of Titles Act (Cap 281) and so there was a race between getting an injunction on the one hand, and registration on the other. The assiduous Mr Vohra, told Mrs Russell that he had seen Mr Nyamu of the First Defendant Bank of July 13, 1984; that he had protested against the sale and the proposed transfer, and that he had been informed that the suit premises would not be transferred before August 2. This was not denied by Mr Philip Mutungi. The Plaintiff now went to work and produced a plaint, a chamber summons applying for an injunction, with affidavit in support, all dated July 18, 1984 but not filed until July 20. The suit was numbered 2016 of 1984. Alas, Mr Wangunyu prevailed. He appeared at Mrs Russell's house on July 28, 1984 with the transfer of July 25, 1984. Gachuhi, J heard the Plaintiff's application for injunction on July 30, 1984 and dismissed it. Whatever the reasons given, it was too late. The suit was never heard.

But Mrs Russell fought on. She went to Mr Kamau Kuria. He filed a second suit No 2179 of 1984 on August 10, 1984, together with its concomitant chamber summons and affidavit of the same date. This was the matter which finally came before Todd, J and which he dismissed, giving rise to this appeal.

Mrs Russell has also fought to stay in possession. She alleged that she had been under the watchman's eye posted there by Mr Wangunyu, since the third week of July; and that on August 9, Mr Wangunyu tried to dispossess her, but fortunately the Police at Karen put her back. Mr Wangunyu, in his affidavit of August 22, 1984, discounted the violence alleged, but it is sufficient to say that he admitted having gone to the house to take possession and that the Police intervened requesting that his agents should leave. She is still in possession.

Todd, J brought an unfavourable answer to MRs Russell's many problems, but it is said that he fell into several errors in doing so. First, it is complained that he was quite wrong about the proper notice to be given by the First Defendant Bank; wrong about the First Defendant being under no duty to notify the Plaintiff Company (now Appellant). He was wrong to hold that the First Defendant Bank was not aware of, and in any case, not affected by the Plaintiff Company's beneficial ownership of the suit premises, as established by Masime, J's orders, at the time of the purported sale on July 5, 1984. Secondly, the Plaintiff did not understand why the learned Judge failed to consider its case against the Second Defendant, and ignored the evidence and contentions of fraud on the part of the Second Defendant. Thirdly, in balancing the interests of the parties the learned Judge was wrong to hold that the suit premises were merely an investment, and not a home for Mrs Russell, and its loss could properly be compensate in damages, which the Second Defendant could pay if the Plaintiff Company succeeded in its suit. The learned Judge had misjudged the balance of convenience in refusing to grant the injunctions applied for.

Before ascertaining what the learned Judge did actually find or decide on these issues, the Defendants had been clamouring to put forward their support for the views expressed by Gachuhi, J (as he then was) especially in their affidavits, and these views culminated in pleas of *res judicata.* The learned Judge, Todd, J did not think that he needed to decide that point. After considering the directions given by this

Court's predecessor in *Giella v Cassman Brown Ltd* [1975] EA 358 at p 360, he expressed the view that:-

> "Other points have been raised by the two defendants namely, for example, the plea of *res judicata* and example 4 but I do not think I need adjudicate on these matters since after considering all the circumstances of the case put before me I think and find that even if the Plaintiff were to be successful against the First and Second Defendants in her case against them she could and would be adequately be (sic) compensated by an award of damages."

An issue such as *res judicata* cannot be avoided because it goes to jurisdiction. Example 4 of Section 7 of the Civil Procedure Act provides for issues left out of consideration being prohibited from being ventilated later. The idea was no doubt that Civil Case No 2179 was caught by Civil Case 2016.

But that may not be so. The aim of Civil Case 2016 was clearly to stop the sale being completed. It was filed on July 20, five days before the registration took place in fact and twelve days before Mr Nyamu is alleged to have promised to stay registration, until August 2, 1984. It would still be in time on July 30, 1984 from this latter point of view. But as we know, as registration in fact took place on July 25, 1984, the attempt to stop registration failed. Moreover the attempt to stop registration was taken solely against the First Defendant. Civil Case 2179 deals with the whole sequence of events and seeks to prevent the Second Defendant from transferring the property to another buyer which may compound the fraud of the two Defendants, as alleged, and give good title to the new buyer. In any event it would unnecessarily complicate an already involved situation. But it is not for us to try these issues. It is sufficient for us to find that probably the High Court in Civil Suit 2179 had jurisdiction to deal with the further developments that had taken place, and it is clear that Gachuhi, J was impressed by the fact that registration had taken place. The final passages in his ruling show that the could not grant the injunction prayed for to restrain the registration after the sale; Suit No 2016 had been overtaken by events. Suit No 2179 deals with the situation throughout before and after registration. At the trial, no doubt it will be emphasized that no final decision was taken in Suit No 2016. Indeed, that is the great difference in quality between the decision of Masime, J which did dispose of the issues set down before him, and the proceedings before Gachuhi, J which could not come to any final decision. An interlocutory injunction deals only with the probable success of the Plaintiff, and therefore is not a matter which is *judicata*, outside those particular interlocutory proceedings.

The matter of substance for Todd, J to decide was whether there was ground to prevent the Second Defendant from disposing of the property. But it is obvious that the Plaintiff Company considers that the Second Defendant's title was affected by the First Defendant's title. Looking at the plaint one is struck by the prayers sought against both defendants. They ask for a declaration, that the purported sale of the suit premises to the Second Defendant was fraudulent and therefore null and void, and consequently that the Second Defendant should deliver up to the Plaintiff the transfer dated July 25, 1984 for cancellation by the Registrar of Titles. In the alternative the Plaintiff asks for a declaration that the exercise of the statutory powers was in breach of the duties the First Defendant owed the Plaintiff. If then the First Defendant had exercised the statutory powers of sale, upon what ground does the Plaintiff allege that he can attack such exercise? According to the plaint the First Defendant exercised the power with full power with full knowledge of litigation pending in respect of the suit premises and the rights of the Plaintiff as declared in Misc Civil Case No 169 of 1980 which was decided by Masime J. It is said that the First Defendant deliberately and intentionally shut its eyes to information that would lead it to discover the rights of the Plaintiff and its obligations to the Plaintiff. The First Defendant caused the suit premises to be advertised and the same to be sold in breach of the duties it owed the Plaintiff; and persisted in the sale after the Plaintiff made protests against the sale and transfer; and indeed it assisted the Second Defendant to procure hurriedly and fraudulently the transfer of July 25, 1984 after both Defendants had learnt that the Plaintiff was arranging to stop the sale; and probably to this end misled the Plaintiff as to the time when the First Defendant would register the transfer in the name of the Second Defendant. All these points attack the exercise of the power of sale by the First Defendant and involve the *bona fides* of the First Defendant and the Second Defendant. The plaint continues to outline the fraud of the Second Defendant namely, that it took part in a hurried transfer, and indeed advertised the property for re-sale on July 18, and on subsequent dates because of the protests of the plaintiff against the statutory sale. Todd J noted that Masime, J had apparently held that Mr

Russell had fraudulently procured the registration of the suit premises in his own name and so held the same upon trust for the true owner, the Plaintiff Company. But he noted that the First Defendant was not a party to the proceedings and, of course, the Second Defendant was not a party either. The learned Judge appeared to have been satisfied that an auction took place on July 5, 1984 after notice in exercise of the First Defendant's rights of sale, as a result of which the transfer of the suit premises took place on July 25, 1984. Considering everything put before him, he thought that an injunction was not necessary and that damages would be an adequate remedy.

It is true that the reasoning is sparse, and that the mere reference to notice relating to the sale of the suit premises is too short a statement in the circumstances of this case. Moreover the attitude towards damages of the learned Judge is surely misconceived. One issue which the trial judge may have to decide is whether or not the suit premises were used as a matrimonial home at the material time. True, after the Plaintiff Company had bought the house, its directors, MR and Mrs Russell used the house as their matrimonial home. After 1977 Mr Russell informed Masime, J the house was left to provide an income, from which the mortgage might be paid, and from which Mr Russell might draw some maintenance. When Mrs Russell re-possessed the house on July 15, 1984 and used it as her home, the mortgage payments had been completed in 1979, with regard to Housing Finance Company of Kenya Ltd loan with which the house was bought. Mr Russell's own mortgage to the First Defendant Company had nothing to do with Mrs Russell apart from paying off the mortgage for the purchase of the house. If she could find her livelihood outside the rental paid for the house, well and good. But however one looks at this case, it was a property of vital concern to the Plaintiff and its Managing Director, Mrs Russell. Its purpose was either to provide revenue or shelter. In these circumstances, to describe it as merely a commercial undertaking is a clear misdirection on the facts. It is difficult to see how the learned Judge envisaged the assessment of damages. If they were to cover the true value of the property, and that came to more than the sale price, it would seem more satisfactory to hold the land by an injunction. But as we have said, the notion that damages were sufficient for a commercial undertaking is a misdirection which allows this Court to reconsider the discretion exercised by the learned Judge (see United India Insurance Company Ltd Civil Appeal 36 of 1983; (unreported) as to the circumstances in which an Appeal Court can interfere with the exercise of discretion by a trail court; and to the same effect *Mbogo vs Shah* [1968] EA 93 at page 96 per Newbold, P). Returning to the question of notice, Mr Kamau Kuria is quite right in pointing out that the notice given by the First Defendant Bank to Mr Russell on October 30, 1969 did not comply with section 69 A of the Transfer of Property Act, and certainly the half-hearted notice dated January 30, 1984, which came to the Plaintiff Company did not begin to comply with that Section. If it was necessary for that notice to be sent, as MR Kamau Kuria contends, then there was an infringement of Section 69A. Certainly the Plaintiff Company did not know by the notice how much money was outstanding in case the Plaintiff Company wished to exercise the equity of redemption. The question that may be asked at the trial is why did the Plaintiff Company do so little to save itself? Having apparently been in constant contact with the First Defendant Bank, the Plaintiff Company first of all did nothing itself to clear the title, (Mr Rice kindly obliged by interpleader proceeding)s, and then did nothing to keep the outstanding loan in view. It did not, as far as we have been told, seek to find out how much was outstanding after the notice of January 30, 1984; it did not offer to redeem to save its valuable asset, when it corresponded with the Bank in February 1985. It is not clear therefore whether a full notice could have served any purpose, since it is unlikely that the Plaintiff would have acted differently because it is not seeking the equity of redemption. But apart from that Mr Gathuru relied on Sec 69B(2) of the Transfer Act, which provides that where a transfer has been made by a Mortgage after exercising its statutory powers of sale, the title of the purchaser cannot be impeached for lack of proper notice; rather a suit for damage can be brought. It follows that though the learned Judge misdirected himself or at least did not make himself clear on the question of notice, his final decision on damages would accord with Section 69B(2) of the Act. We were referred to *Clarke vs Japan Machines (Australia) PTY Ltd*, [1984] Queensland Report 404 but it seems that the statute involved does not contain the same terms as Section 69A,

Section 69B(2)'s equivalent, if there is one, was not referred to. We are content therefore to rely on Section 69B(2) as concluding this part of the argument.

What then was the position of the First Defedant?

We should begin by examining its relation to Mr Russell. Masime, J held that Mr Russell had contrived a fraud upon the Plaintiff Company, and we have to accept that that is the *prima facie* position until the appeal is heard. It is a fact in issue, or explains the Plaintiff's possession, as an exception to Sec 46 of the Evidence Act (Cap 80). As Masime, J pointed out, the Plaintiff Company lost interest in the registration of its title, after finance to purchase the house had been arranged. But assuming that Mr Russell had acted fraudulently, (and certainly Mr Russell has been in no hurry to remove this stigma by prosecuting the appeal, the First Defendant Bank is not alleged to have been tainted by this fraud in registering the Charge. It will be recalled that the Charge was registered in September 1979 and Masime, J's judgment was delivered in 1981. There is apparently nothing on the title to suggest foul play. There is nothing to suggest that Mr Rice's occupation would indicate another interest. At least that is the view expressed in the textbook the Torrens System in Malaya by SK Dass [1963], Chapter 12 on Impeachment of Title relied on by Mr Kamau Kuria at p 242.

> "Possession by a third party of the land does not put upon the purchaser the obligation of making any enquiry as to his actual rights."

The reason given was that the occupier might have a tenancy not exceeding one year, or in other words an unregistered valid lease for that short period. It seems that the conclusion would probably be that the Bank did not know of the Plaintiff Company's position in 1979. Consequently the Bank acquired an unimpeachable title to the Charge, because:-

> The Vendor cannot prejudice an innocent purchaser solely by his own fraud to which the purchaser was no party and of which he had no knowledge." – (page 239 (ibid).

If then the Bank learned later of the Plaintiff's unregistered interest the position according to Mr Kamau's authority is follows:-

> "In other words, it seems that it is not fraud merely for a purchaser who had become registered to take advantage of the priority conferred by the Torrens System, even if he proceeded to registration with the knowledge of an unregistered interest in the land–… remembering always however that if the designed object of a transfer be to cheat a man of known existing right, that is sufficient to ascribe fraud to him (p 245 *ibid*)."

How should the First Defendant Bank have received the news of Masime, J's judgment? First of all it was subject to appeal, and that circumstance reduced its character of finality. The charge would take precedence having been registered first in time, and it is doubtful whether such orders could be made without joining the Registrar and the Chargee, (Cf *Bir Singh Parmar*, [1971] EA 209 at p 211). This is the point made in *Impeachment of Title* pointed out to us by Mr Kamau (p 245).

> "Where there are two transfers of land, one subsequent to the other, and the transferee of the later date gets his transfer on the register with notice of the prior unregistered interest, the fact that the second transferee may, in addition to a desire to acquire the land, have been actuated by a wish to get rid of an undesirable neighbour who occupied the land cannot amount to fraud, the rules of equity as to notice being expressly abrogated."

That is the position under the Registration of Titles Act. The rules of equity as to notice have been abrogated, because is the policy of that Act to free purchasers as far as possible from the necessity of concerning themselves with unregistered interests, (for the position in England see *William & Glyn's Bank vs Boland*, [1981] AC 487 at pp 503 & 504).

It is therefore very unlikely, so the Defendants contend, that the facts in this case would have the effect of attaching fraud to the First Defendant in deciding to sell the property.

We may then examine the position between the Second Defendant and the First Defendant. That is also covered in Impeachment of Title page 241 which deals with legislation on the pattern of the Torrens system:-

> "Where there is nothing but notice or knowledge of an unregistered interest it is not fraud to buy from a registered proprietor though such knowledge may be an element in building up a case of fraud, it does not of itself constitute a fraud."

It is trite law that the law in Kenya is based on the Torrens System. If authority is wanted it will be found in *Souza Figuiredo vs Moorings Hotel,* [1960] EA 926; *Cross v Great Insurance Company Limited of India,* [1966] EA 94.

It will be seen therefore that the Defendants could well argue that the Second Defendant got a clear title having purchased the land in an auction because the First Defendant exercised its statutory powers of sale. Moreover, as Section 24 of the Registration of Titles Act provides, if the Plaintiff Company has been deprived of its property through fraud it may be able to sue for damages.

Mr Kamau Kuria argued that the Defendants were not entitled to ignore the warning that Masime, J had held that the Plaintiff Company was the beneficial owner of suit premises and that steps would be taken to rectify the register. It was acknowledged that "fraud" in Section 2 of the Registration of titles Act is defined to mean –

> "On the part of a person obtaining registration include a proved knowledge of the existence of an unregistered interest on the part of some other person, whose interest he knowingly and wrongly defeats by that registration.

If follows that, although the equitable doctrine of notice may well be abrogated, and certainly Section 23 of this Act (Cap 281) has this effect, nevertheless, as the Australian authorities referred to in Impeachment of Title show knowledge of the interest is the foundation of proving fraud. But it must be accompanied by other facts. Mr Kamau Kuria cites the hurry to get the registration of the sale carried through before August 2, 1984 on the part of the First Defendant and the haste to resell the property on July 18, 1984 by the Second Defendant at an enhanced value. Indeed if Mrs Russell is right, the Second Defendant offered to resell the house to he for Kshs 1.5 Million 3 days after the sale.

There is perhaps another aspect and that is that the Plaintiff Company had acquainted the First Defendant of the fact that the First Defendant had become the Chargee of land which was ultimately owned by the Plaintiff Company and not MR Russell. The First Defendant Company has pointed out in its affidavit that it paid off the mortgage of Mr Russell and is holding the balance of the proceeds of the sale, for whoever turns out to be the owner of the property. It could possibly be argued that the First Defendant Company is so closely connected with Mr Russell or the Plaintiff Company, that it falls within the ambit of Section 52 of the Transfer of Property Act. There is still an appeal pending concerning immovable property, the right to which is directly and specifically in question and it is arguable that the First Defendant Bank is sufficiently a party to be barred from exercising its power of sale by not coming to the Court and asking the Court for permission to sell. Mr Kamau Kuria especially relied upon *Jandu vs Kirpal* [1975] EA 225 at p 231. In that case the allegation of fraud was that the Defendants were aware of the caveat of the Plaintiff protecting its interest as purchaser and knew of the unregistered interest in land of the Plintiff arising from an uninterrupted possession, or alternatively had the means of knowledge of such unregistered interest, and yet knowingly and wrongly they were attempting to get themselves registered as owners of the land in question, and had applied for vesting orders. The argument was that this allegation was vague and inadequate. But the learned Judge, the late Chanan Singh, J observed that the attack on vagueness was not out of place if common law fraud was being relied upon. However, common law fraud was not being relied upon, but rather fraud as defined in Section 2 of the Registration of Titles Act which we have set out above. The learned Judge having set out this definition continues as follows:-

"The term""fraud" is used in Section 23 of the Registration of Titles Act which will fall for consideration if the Plaintiff Company succeeds in the present case. That section states that the certificate of Title used by the Registrar is""conclusive evidence," of the fact that the person named therein is "the absolute and indefeasible owner" whose title is not "subject to challenge, except on the ground that fraud or misrepresentation to which he is proved to be a party."

> "The facts that support the allegation of this statutory fraud are known. Mr Salter says that having filed the present suit he wrote to Mr Khanna as the Advocate of the Defendant saying that his client was claiming title by adverse possession. There is no need to go any further into the implications of the definition of""fraud." If the Plaintiff Company succeeds in establishing title by adverse possession he will, in my opinion, have established his right to get the registration in favour of the Defendants case set aside under Section 23 on the ground of fraud as defined in the Act."

The learned Judge was not prepared to state what the meaning of fraud might be, and the effect of his opinion was not as strong as it would have been if he had acted on it. But in fact he held that the plaint disclosed no cause of action, and he ordered it to be struck out. Hence, although he held that fraud might give the Plaintiff Company a cause of action, he did not act upon it.

The second observation that we would make is that Section 75 of the Registration of Titles Act was not brought to the attention of the learned Judge which provides that nothing contained in this Act shall take away or affect the jurisdiction of the Court on the ground of actual fraud. Therefore it could be argued that Section 23 of Cap 281 may refer not only to fraud as defined but also actual fraud as referred to in Section 75. It is possible to argue that if the Court's jurisdiction remains intact it could set aside registration apart from the damages which may be claimed under Section 24 of the Act. It is for consideration whether Section 75 preserves common law fraud within which Chanan Singh, J was concerned.

Thirdly we would notice that although *Jandu vs Kirpal* is an obiter decision of the High Court, it is some authority that even fraud as defined in Section 2 of the Act could have the effect of setting aside the registration.

Finally we should notice in passing that mere knowledge of a trust such as Masime, J declared in favour of the Plaintiff Company is not of itself to be imputed as fraud. (Sec 80(2) Registration of Titles Act).

Mr Kamau Kuria also referred us to *Standard Charter Bank vs Walker* [1982] 3 All ER 938 where at page 942 Lord Denning, M R (as he then was) set out the duties of mortgagee who enters into possession and realizes a mortgaged property. He relied on *Cuckmere Brick Company Ltd vs Mutual Finance Ltd*, [1971] 2 All ER 633. The mortgagee owes a duty of reasonable care to obtain the best possible price which the circumstances of the case permit. It does not seem to us that whilst the First Defendant Bank m ay have owed the Plaintiff Company a duty of care, as having an interest in the suit premises as beneficial owner, that this duty affects the decision whether we are or are not to grant an injunction. It tends more towards a suit for damages for negligence. (See *Tse Kwong Lam vs Wong Chit Sen* [1983] 3 All ER 54). But it seems to us that had Todd, J not misdirected himself on the commercial nature of the suit premises, and to some extent on the nature of the notice required under Sec 69A, he would probably have found that the case fell under the third principle in *Giella vs Cassman Brown and Company Limited* [1973] EA 358 namely that if the Court is in doubt it will decide an application on the balance of convenience.

Looking at the whole matter in this way, we find that the Plaintiff Company claims immovable property which in the circumstances would be an irreparable loss to it, if it were sold. Moreover, what damages would be appropriate? The learned Judge had granted damages on the basis that the property was worth more than the price the Second Defendant paid for it in the auction. That will be an inference if his offer to Mrs Russell is right. But in that case it will be more suitable to preserve the property. There was no specific evidence as to whether the Second Defendant would be able to pay such damages. On the other hand, it is not clear whether Mrs Russell on behalf of the Plaintiff Company can give a realistic undertaking to pay the costs if she loses. However, these doubts may more easily be set at rest by preserving the property pending the, subject to Mrs Russell showing that she can give a proper undertaking.

In the result then, we allow the appeal and set aside the order of the High Court, substituting therefore an order granting the Plaintiff Company injunctions in terms of prayers 2 and 4 of the Chamber summons dated August 10, 1984. The Applicant shall have the costs of his appeal as well as the costs of the

application to the High Court.

We observed earlier that we should have something to say on the discretion to be exercised by the High Court when there is an appeal against its refusal to order an injunction. We would commend the views of Megarry, J (as he then was) in *Erinford Properties Ltd vs Cheshire County Council,* [1974] 2 All ER 448; that the purpose of such an injunction is to preserve the *status quo* for a short period until the notice of appeal has been lodged. Then the High Court can consider whether the nature of the appeal would be rendered nugatory if an injunction were not continued. It is necessary for the High Court to be loyal and realistic at this stage, in case wider issues than those relied upon have to be taken into consideration.

**Dated and Delivered at Nairobi this 29th day of December, 1985.**

**A.A.KNELLER**

**.....**

**JUDGE OF APPEAL**

**J.O.NYARANGI**

**.....**

**JUDGE OF APPEAL**

**H.G.PLATT**

**.....**

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**